NO. 48850-7

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LEONEL GONZALEZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 15-1-03790-2

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was sufficient evidence of witness tampering introduced where the defendant's jail call conversation was introduced into evidence, and where it included the defendant attempting to persuade the victim to falsely recant and provide a statement supporting his defense that he had permission to drive the stolen car?

2. Did the elements instruction for drug possession include all essential elements where the identity of the controlled substance made no difference in the length of the defendant's sentence?

B. STATEMENT OF THE CASE.

1. *Procedural History.*

On September 22, 2015, Appellant Leonel Gonzalez (the "defendant") was charged with four criminal offenses, including vehicle theft, possession of a controlled substance, and two gross misdemeanors. CP 1-4. The charges were amended to include witness tampering on February 25, 2016. CP 5-7. That charge was related to a phone conversation between the defendant and a woman with whom he had a long-term relationship, Nona Hook. *Id.*

The case was assigned for trial on April 4, 2016. 1 RP 3[1]. The trial lasted four days. The prosecution called six witnesses and introduced four exhibits. CP 72. One of the witnesses was Nona Hook, and one of the exhibits was a CD containing a jail recording of the conversation. *Id.* In addition to testifying about the circumstances in which the defendant stole her mother's SUV and was arrested for it, Ms. Hook also testified about the conversation which took place after his arrest, while he was in jail and concerned recanting statements that he wanted her to provide to his defense investigator. Trial Exhibit 1A. 2 RP 210, et. seq. The jail calls were played while Ms. Hook was on the stand and she was asked questions about the recording. *Id.*

At the conclusion of the testimony, the jury was instructed as to each of the crimes. CP 12-43. In particular the jury was instructed as to the two crimes at issue in this appeal, possession of a controlled substance and witness tampering. *Id.* The defendant did not take exception to any of the instructions related to those offenses. 3 RP 293. The parties presented closing arguments on April 6, 2016. Neither party disputed that the defendant had illegal drugs, methamphetamine, on his person when he was arrested. 3 RP 300-01, 319.

[1] The verbatim reports in this case consist of four consecutive paginated volumes of trial transcripts. These will be cited by volume and page number. Other citations will include the date of the proceeding and page number.

The defendant was found guilty of two of the controlled substance offenses and witness tampering, on April 7, 2016. CP 44-47. He was sentenced on April 15, 2016, to a total of 51 months in prison. CP 54-67.

2. *Statement of Facts.*

On September 18, 2015, Carol Salyers, the mother of Nona Hook lived with Ms. Hook and her children in a rambler in the south end of Tacoma. 2 RP 151. She was the owner of a 2006 Jeep Liberty. 2 RP 154. She knew the defendant as Ms. Hook's boyfriend and at times in the past he had lived with her. 2 RP 155-56, 179. As of September 18, 2016, the defendant stayed at the house at times but was living elsewhere. *Id.* As of September 18, the defendant did not have permission (Ms. Salyers' testimony was, "Absolutely not." [2 RP 157-58.]) to drive her Jeep because she had expressly revoked permission, and because the defendant had wrecked a previous car of hers. *Id.* 2 RP 180

On September 18, Ms. Salyers called the police because her Jeep was stolen during the previous night. 2 RP 159-163. Nona Hook was the last person to drive the Jeep with Ms. Salyer's permission. 2 RP 186. When she finished she parked it in the driveway but left the keys just inside the back door on a table. 2 RP 186-88. During the night the defendant came in the house and woke her up briefly. 2 RP 188-90. She angrily told him to leave, went back to sleep and woke up the next morning to find the Jeep gone. 2 RP 188-92.

The defendant kept the Jeep approximately three days. 2 RP 193. On September 21, 2016, he drove the Jeep to the vicinity of the victims' house, the police were called and he was apprehended in the alley in the Jeep. 2 RP 195-98. One of the arresting officers found suspected methamphetamine in an Altoids tin in the defendant's pocket as he was being taken into custody. 3 RP 242-43. The substance was analyzed by the Washington State Patrol Crime Laboratory and found to contain a mixture of methamphetamine and cocaine. 3 RP 286.

After the defendant was charged, while he was in jail, Ms. Hook had a telephone conversation with him about recanting to his defense investigator. 3 RP 214. The conversation was recorded and played for the jury with Ms. Hook on the stand. *Id.* In her testimony Ms. Hook acknowledged her love for the defendant. 3 RP 233. She also acknowledged that he had tried to get her to change her story in the past but that she was stubborn and not likely to do so. 3 RP 217, 232. She also acknowledged that he told her that their relationship was going to be impacted because they would be apart from each other for a considerable period of years, namely six to fifteen years. 3 RP 233-34.

The parties closing arguments included arguments concerning the stolen vehicle and witness tampering charges. 3 RP 305-06, 318. The drug possession charge was largely not contested. 3 RP 300-01, 319. The defendant was found guilty of witness tampering and the drug charge on

April 7, 2016. Following sentencing on April 15, 2016, the defendant timely filed this appeal on April 19. CP 54-67.

C. ARGUMENT.

1. SUFFICIENT EVIDENCE OF WITNESS TAMPERING WAS INTRODUCED WHERE IN A RECORDED PHONE CALL FROM JAIL THE DEFENDANT SOUGHT TO PERSUADE A WITNESS TO PROVIDE FALSE EVIDENCE TO A DEFENSE INVESTIGATOR TO BE USED IN HIS DEFENSE.

The standard for sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***State v. Rempel***, 114 Wn.2d 77, 82–83, 785 P.2d 1134 (1990), citing ***State v. Green***, 94 Wn.2d 216, 616 P.2d 628 (1980), and ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); ***State v. Theroff***, 95 Wn.2d 385, 388, 622 P.2d 1240, 1243 (1980) and ***State v. Hosier***, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Stated another way, the standard means that if two or more rational fact finders could differ, the conviction should be upheld; it is only when no rational trier of fact could have convicted that a claim of insufficiency should be sustained. ***State v. Smith***, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

The sufficiency standard also requires that a court apply several presumptions concerning the evidence. First, the defendant "admits the truth of the State's evidence" and all reasonable inferences that can be

drawn from it. ***State v. Williamson***, 131 Wn. App. 1, 5-6, 86 P.3d 1221 (2005), citing ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Because a reviewing court may not "determine witness credibility, reweigh the evidence, or supplant [its] judgment for that of the jury," it follows that conflicts in the evidence and the weight to be given it are to be resolved in the State's favor and consistent with the jury's verdict. ***State v. McCreven***, 170 Wn. App. 444, 480, 284 P.3d 793 (2012). *See also* ***State v. Thomas***, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), *abrogated in part on other grounds* by ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), ***State v. Liden***, 138 Wn. App. 110, 117, 156 P.3d 259 (2007), and ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence. ***State v. Williamson***, 131 Wn. App. at 5-6, ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Witness tampering is committed when a defendant attempts to induce a witness or a person about to be called as a witness to give false testimony or withhold testimony. RCW 9A.72.120(1)(a). ***State v. Lubers***, 81 Wn. App. 614, 622, 915 P.2d 1157, 1161 (1996), citing ***State v. Henshaw***, 62 Wn. App. 135, 813 P.2d 146 (1991). Where a witness knows or has a relationship with the defendant it is a charge greatly

affected by bias and credibility. Not all witnesses are strangers for whom coercion or persuasion or other undue influence by the defendant is necessarily unwelcome.

The jury instructions in this case properly included all of the requisite elements of the offense. In particular the inducement element required proof beyond a reasonable doubt that "on or about the 9th day of October, 2015 the defendant attempted to induce a person to testify falsely or, without right or privilege to do so, withhold any testimony. . . ." CP 12-43, Instruction 25. This instruction was not objected to, not excepted to, and no alternative was proposed by the defendant. RP 275-76, 288-94. As such any error was waived and this instruction has become the law of the case. RAP 10.4(g). ***State v. Hickman***, 135 Wn.2d 97, 102, 954 P.2d 900, 902 (1998) ("[J]ury instructions not objected to become the law of the case.") citing ***State v. Hames***, 74 Wash.2d 721, 725, 446 P.2d 344 (1968), ***State v. Leohner***, 69 Wash.2d 131, 134, 417 P.2d 368 (1966) and ***State v. Salas***, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995).

The conversation supporting the charge was heard by the jury because it was captured in a jail recording admitted into evidence. Exhibit 1A. 3 RP 214. The recording was made after the defendant's arrest, after charges were filed and while the defendant was being held in jail. Furthermore, the reference to the defense investigator was a reference to

the defendant's legal team. A more than reasonable inference could be drawn that the defendant was assembling the evidence and information to be used in his defense. These circumstances provide a basis for the jury's finding that the state had sustained its burden on the inducement element of the charge.

The jury heard the exact words said by the defendant and the manner and circumstances in which they were said. The jury had the full context and was in the best possible position to determine whether the defendant "attempted to induce a person to testify falsely" or "withhold any testimony" by what he said. If an appellate court were to substitute its judgment about the content, meaning and inferences to be drawn from a recording such as Exhibit 1A, it would be tantamount to a trial judge commenting on the evidence by conveying " 'personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.' " ***State v. Levy***, 156 Wn.2d 709, 721, 132 P.3d 1076, 1081 (2006), quoting ***State v. Becker***, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). ***State v. Jackman***, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2007).

The recording itself is sufficient evidence. In it at approximately time stamp 6:30 minutes, the defendant initiates the discussion of Ms. Hook changing her story. Exhibit 1A. He told her in a rather emphatic

tone "you tell them that you gave me permission. . . ." *Id.* When Ms. Hook expresses reluctance the defendant plays to her emotions by saying "then I'll just get more time. . . ." *Id.* The two of them also reference the fact that they were being recorded and thus recognized the need for circumspection. They agreed to "not talk about all that" and instead wait until Ms. Hook could come for an in person visit. *Id.* The defendant also initiated a discussion of how much time he would be getting, that is from six to fifteen years, and whether they could marry.

In addition to the recording of the actual conversation, the jury in this case also heard from one of the parties to the conversation. Nona Hook testified that the defendant had tried to get her to change "what you were going to say" in the past. 3 RP 232. She was asked about what the defendant said in the recording and what her reaction was, including that after she initially said that it would be difficult for her, the defendant persisted in his effort by saying, "a little bit after that he told you, 'You know what to do' . . . A. Yes." 3 RP 233. Ms. Hook had an obvious and admitted bias in his favor. She testified that she loved the defendant at the time he committed the offense and at the time she testified at trial. 3RP 215. She minimized her own susceptibility to the defendant's persuasion, saying that although she might have wanted to help the defendant, "No, I couldn't; that's my mom – I mean, my mom's car. I mean, I love him, but

that's my parent." 3 RP 216. This of course confirms that he in fact did ask her to help him. Knowing that he faced as many as 15 years in prison [3 RP 234], Ms. Hook claimed that she was stubborn and not likely to change her story on his behalf. 3 RP 217.

Contrary to the minimization that Ms. Hook displayed on the stand, the content of the recording was telling. It included (1) an explicit request that she recant falsely to an investigator, (2) a specific request that she falsely say she gave the defendant permission to take the stolen car, and (3) a discussion of the lengthy prison term the defendant faced. Exhibit 1A. Ms. Hook admitted the pressure he was putting on her and said, "[the defendant] went on to discuss with you terms of six years or 15 years, and things like that. Right? . . A. Yes." 3 RP 234. The jury was fully entitled to consider the defendant's actual words to have been an actual attempt to induce rather than a fleeting, innocent conversation. This is especially true even if Ms. Hook's bias led her to minimize.

Under the plain terms of the to-convict instruction, Instruction No. 25, the defendant committed the crime when he "attempted to induce a person to testify falsely". There was no requirement that he succeed. There was no requirement that he believe he had a good chance of succeeding. It was enough that he attempted to get Ms. Hook to change her story even if it was a long shot. That is, even if she considered herself

stubborn and even if he knew she was stubborn, a rational jury could find the defendant guilty because he made an effort to tamper even if it was a long shot.

It is important to remember that the same jury that heard the jail recording also observed Ms. Hook's demeanor. Thus when she minimized what the defendant said to her over the jail phone the jury not only heard what she said but saw how she said it. Recognizing that Ms. Hook was biased in the defendant's favor because of her love for him, it was perfectly rational for the jury to discount her minimizations and consider instead the circumstances. The circumstantial evidence is no less valuable. CP 12-43, Instruction No. 4. In sum, where the defendant asked her to give a statement whereby she would change her anticipated trial testimony, where he wanted her to say that she gave him permission to take the car, and where he reminded her of the 6 to 15 year sentence hanging over him, there was a good deal of common sense in the jury's conclusion that the defendant had attempted, albeit with a good deal of caution, to induce Ms. Hook to testify falsely. The witness tampering verdict should therefore be affirmed.

2. THE JURY INSTRUCTIONS INCLUDED ALL ESSENTIAL ELEMENTS OF THE POSSESSORY DRUG CRIME WHERE THE IDENTITY OF THE CONTROLLED SUBSTANCE MADE NO DIFFERENCE IN THE SENTENCING.

The Due Process Clause of the Fourteenth Amendment requires that every fact necessary to constitute a crime must be proved beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970), ***State v. Byrd***, 125 Wn.2d 707, 713, 887 P.2d 396, 399 (1995). "The purpose of the 'essential elements' rule in the context of a to-convict instruction is to ensure that the jury is not left guessing at the meaning of an element of the crime and that the State is not relieved of its burden of proving each element of the crime." ***State v. Saunders***, 177 Wn. App. 259, 260–61, 311 P.3d 601 (2013). Where an element is essential "jurors are not required to supply an omitted element by referring to other jury instructions." ***State v. Smith***, 131 Wn.2d 258, 262–63, 930 P.2d 917, 919 (1997). But this does not mean that each and every legal term must be defined within the four corners of the to-convict or elements instruction.

Saunders is an example of a proper elements instruction that did not define a crucial term. ***Saunders***, 177 Wn. App. 259, 260–61, 311 P.3d 601 (2013). In ***Saunders*** the court held that the restraint element in unlawful imprisonment need not be defined in the elements instruction. *Id.* at 269. The Court said, "The reasoning in ***Lorenz*** and ***Allen*** applies to

this case. If the legislature had intended for the statutory definition of restraint to be an element of the crime to be included in a to-convict instruction, it could have included the definition, or any part thereof, in [the statue defining the crime]." ***State v. Saunders***, 177 Wn. App. 259, 269, 311 P.3d 601, 606 (2013), citing ***State v. Lorenz***, 152 Wn.2d 22, 93 P.3d 133 (2004) and ***State v. Allen***, 176 Wn.2d 611, 630, 294 P.3d 679 (2013).

The reasoning from ***Saunders*** applies to the drug identity issue in this case. The statute defining the crime of possession of a controlled substance does not include the word methamphetamine nor any other specific drug. It simply outlaws possession of a "controlled substance". RCW 69.50.4013(1). In fact (contrary to the defendant's argument) the only substance mentioned is marijuana and that reference is (1) a reference to the statutory provisions decriminalizing marijuana, and (2) a cross reference to a separate statutory section which criminalizes less than 40 grams of marihuana. *See* RCW 69.50. 4013(3) and .4014. Not even the defendant would claim that he was charged with or that he possessed marihuana, much less that he did so lawfully in recreational amounts or for medicinal purposes.

The particular substances that are controlled and therefor illegal to possess under the statute here are defined in other statutory provisions.

This is the same as the term restraint which was defined separately in ***Saunders***, or sexual gratification which was defined separately in ***Lorenz***, or true threat which was defined separately in ***Allen***. ***State v. Saunders***, 177 Wn. App. at 268, ***State v. Lorenz***, 152 Wn.2d at 36, and ***State v. Allen***, 176 Wn.2d at 628.

Although the identity of a controlled substance does not appear in the statute defining the crime of possession, the identity of a substance is considered to be an essential element when it has the effect of increasing the potential punishment. ***State v. Goodman***, 150 Wn.2d 774, 785–86, 83 P.3d 410 (2004). "It is clear under ***Apprendi*** the identity of the controlled substance is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant." *Id.* citing ***Apprendi v. New Jersey***, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). It is important to note that ***Goodman*** was a charging case, not a jury instruction case. *Id.*

After ***Goodman***, the Supreme Court upheld a conviction in a drug case in which the substance was not included in the elements instruction. ***State v. Sibert***, 168 Wn.2d 306, 312, 230 P.3d 142, 145 (2010). ***Sibert*** involved a drug distribution or drug dealing offense, namely delivery of a controlled substance. In drug dealing cases as contrasted with drug possession cases the particular substance can enhance the penalty. *See*

RCW 69.50.401(2)(a) through (e). By contrast the penalty for possession of a controlled substance is the same no matter what substance is involved. RCW 9.94A.517, Table 3, and .518, Table 4. Thus the observation from ***Sibert*** that "not every omission of information from a 'to convict' jury instruction relieves the State of its burden of proof; only the total omission of essential elements can do so", not to mention the votes of eight of nine justices affirming the conviction is particularly noteworthy in this case. *Id.* at 312.

The ***Clark-El*** case, like ***Sibert*** involved drug dealing not drug possession. ***State v. Clark–El***, 196 Wn. App. 614, 618, 384 P.3d 627 (2016). The maximum penalty increased from five years to ten just as it had in ***Sibert***. *Id.* "When the identity of a controlled substance increases the statutory maximum sentence which the defendant may face upon conviction, that identity is an essential element." *Id.* citing ***State v. Goodman***, 150 Wn.2d 774, 778, 83 P.3d 410 (2004) and ***State v. Sibert***, 168 Wn.2d 306, 311–12, 230 P.3d 142 (2010). In short ***Clark El, Sibert***, and ***Goodman*** all stand for the same thing, namely that in drug cases where the penalty for an offense is enhanced because of the identity of the drug, the identity of the drug is an essential element of the crime.

In this case the penalty was the same no matter what substance was in the defendant's pocket. RCW 9.94A.517, Table 3, and .518, Table 4.

See 2016 Washington State Adult Sentencing Guidelines Manual, § 4, pp. 350-51. Accordingly it can be said that the identity of the substance is not an essential element of the crime in this case.

It is worth noting that the discussion in ***Clark-El*** included an excellent analysis of the voting of the justices of the Supreme Court in ***Sibert***. The court in ***Clark-El*** observed that "In ***Sibert***, a four-justice plurality of our Supreme Court held that the failure to specify methamphetamine in the to-convict instruction was not error when (1) the to-convict instruction 'incorporated the drug identity by reference to the charging document, which specified methamphetamine,' and (2) 'that drug and only that drug was proved at trial.' . . . With the additional vote of a fifth justice who concurred in the result only, the plurality affirmed the defendant's conviction and sentence." ***State v. Clark–El***, 196 Wn. App. at 619. The circumstances in ***Sibert*** that were determinative to the plurality are the exact circumstances in this case.

In the case before the court, methamphetamine was the only substance at issue. It was the only substance mentioned in the charging document. CP 5-7. It was the only substance mentioned in the jury instructions. CP 12-43, Instruction No. 20. The instructions referenced the charging document by referring to "count II" and Instruction No. 20 advised the jury that under the law methamphetamine was a controlled substance. *Id.* Under these circumstances there could be no

misinterpretation by the jury of the prosecution's burden of proof as to the charge in count two.

The trial court did not advise the jury that there are other substances that are classified as controlled substances. Neither the trial court nor either of the parties discussed with the jury that the defendant could have been charged under other circumstances with possession of cocaine or heroin or any other substance classified as a controlled substance. 3 RP 301, 319. Thus, when the jury considered the evidence the only substance it could convict on was methamphetamine even though the crime lab drug analyst found that the crystal substance in the Altoids tin contained both methamphetamine and cocaine. 3 RP 286. Neither party referenced cocaine as an option for convicting the defendant of the charge, plus the reference to the charging document foreclosed any confusion as to what substance was at issue. 3 RP 301, 319.

The voting analysis in ***Clark-El*** would be of more interest in a drug dealing case where it might matter. Here, no matter how one dissects the Supreme Court's meaning in ***Sibert*** there is no hint that the outcome was not intended by eight of nine justices. The reliance in ***Sibert*** and ***Clark-El*** on the analysis in ***Goodman*** puts to rest any notion that in a possession case the identity of the substance is mandated by due process to be included in the elements instruction when it does not affect the sentence. The identity of the substance was immaterial insofar as punishment was concerned. Therefore, there was no due process

violation. It follows that the defendant's conviction for the drug possession offense should be affirmed.

D. CONCLUSION.

For the foregoing reasons the state respectfully requests that the defendant's convictions be affirmed.

DATED: Friday, February 24, 2017.

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-24-17 Teresa Kay
Date Signature

PIERCE COUNTY PROSECUTOR

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